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September 13, 2004  
LL File No. 2004-1220

Dear Ms. Camp:

In response to your request of September 10, 2004, concerning 1981 and 1983 reports on de facto marriage in the People's Republic of China (PRC), please find enclosed photocopies of the two documents. The 1981 report was prepared by the former chief of the Eastern Law Division, Tao-tai Hsia, and Ms. Kathryn Haun; the 1983 report, by Dr. Hsia and Ms. Constance A. Johnson. Please note that while you had cited the date of the 1981 report as being December 1981, the copy of the report that was found is dated November 1981. In addition, I have enclosed what seems to be a follow-up letter to the 1981 report dated March 1982. It includes a translation of an article from a Chinese legal treatise, prepared by Dr. Hsia and Ms. Haun. A photocopy of my 1998 study on de facto marriage in the PRC, prepared on the basis of a report I prepared for the Department of State, is also enclosed at your request.

In regard to all of these materials, however, it is important to note that the 1980 Marriage Law was amended on April 28, 2001. There is no specific mention of de facto marriage (*shishi hunyin*) in the Law. However, a sentence that refers to unregistered unions was added to the former article 7 (now article 8) on marriage registration. I have underlined the new part of the text below and added the bracketed remark:

Art. 8. A man and a woman wishing to get married are required to register their marriage in person with the marriage registration department. Those who can meet the requirements prescribed in this law shall be allowed to register and shall be issued Marriage Certificates. Once they are issued Marriage Certificates, they shall become husband and wife. Married couples who have yet to register their marriages [wei banli jiehun dengji de, lit. those who have not yet arranged for marriage registration] are required to complete the required registration formalities. [For the Chinese text, see 21 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (Gazette of the State Council of the People's Republic of China) 8-15 (July 30, 2001); for an English translation, see *Apparent Text of Amended PRC Marriage Law*, XINHUA, Apr. 28, 2001, as translated in Foreign Broadcast Information Service online subscription database, Apr. 29, 2001, ID: CPP20010429000001.]

A December 2001 Supreme People's Court Interpretation on the application of the Marriage Law expounds upon unregistered relationships and de facto marriage, especially in the context of divorce and inheritance rights. The Interpretation states that if both parties subsequently complete marriage registration according to the provisions of article 8, the marital relationship will take effect as of the time when both parties satisfy the essential substantive conditions for a marriage as provided for by the Marriage Law (Interpretation, article 4).

The Interpretation provides that a man and a woman who do not complete marriage registration in accordance with article 8 of the Marriage Law, but cohabit in the name of husband and wife, will be treated differently if they file a lawsuit for divorce in the people's court. If both parties had satisfied the substantive conditions for a marriage *before* the promulgation of the February 1994 Regulations on the Control of Marriage Registration [please refer to the enclosed 1998 report], their relationship will be treated as a de facto marriage. If they satisfied those conditions *after* the promulgation of the Regulations, the people's court will ask them to complete the marriage registration before it will accept the divorce case. If they fail to do so, their live-in relationship will be dissolved (article 5). The Interpretation further stipulates that the courts will also handle, according to these same principles set forth in article 5, claims of inheritance rights to a deceased partner's estate made by the surviving party of husband-and-wife cohabitation relationships (article 6). The Interpretation was adopted on December 24, 2001, and entered into effect on December 27, 2001. For the Chinese text, see 1 *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao* (Gazette of the Supreme People's Court of the People's Republic of China) 16-17 (2002); for an English translation, see Isinolaw online subscription database, ID: JI-0-10-0-110.

It has been our pleasure to assist you, and we hope that this information will be helpful. The Law Library of Congress is the legal research arm of the U.S. Congress; Congressional workload permitting, the Law Library also serves the legal research needs of the other branches of the U.S. government and renders reference service to the general public. Should you need further assistance in this or any matter pertaining to international, comparative, or foreign law, please contact the Director of Legal Research, Walter Gary Sharp, Sr., by e-mail at [wsharp@loc.gov](mailto:wsharp@loc.gov) or by fax at (202) 707-1820.

Sincerely,

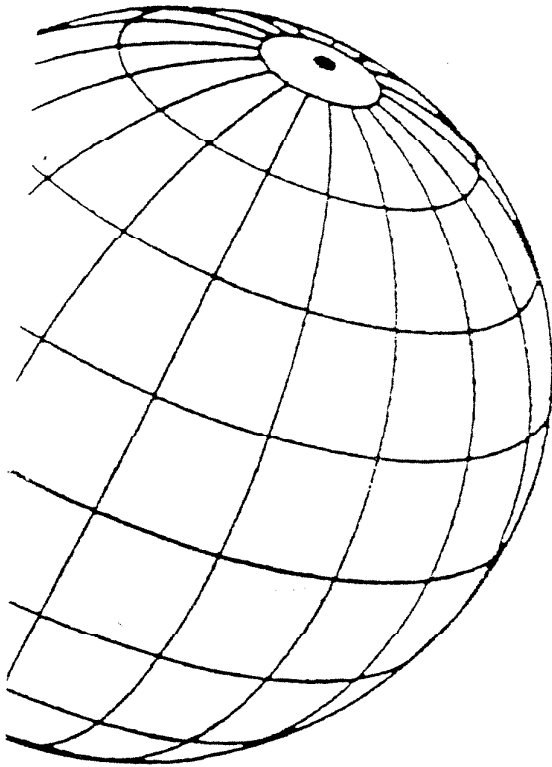


Wendy Zeldin  
Senior Legal Research Analyst

Enclosure

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# LAW LIBRARY SCOPE TOPICS



## **China: Early Marriage and De Facto Marriage**

by Wendy I. Zeldin  
Senior Legal Research Analyst

98-1751

March 1998

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LLST - 25

## CHINA: EARLY MARRIAGE AND DE FACTO MARRIAGE

The legal status of early and de facto marriages in the People's Republic of China has for a long time been obscure. Although the 1980 Marriage Law prohibits early marriage, the ban has been difficult to enforce, as is evidenced by provisos against it in subsequent marriage-related legislation. There is no explicit prohibition against de facto marriage in the Marriage Law, but the Government has similarly made repeated efforts to tighten controls over and discourage it. Before the enactment of the Marriage Registration Procedures of 1986, if a couple who had lived together met all the requirements of marriage by the time their status became a matter of legal dispute, even if they had been underage or otherwise legally unqualified during their cohabitation, their union would be regarded as a de facto marriage; after that date, if during the period of cohabitation the couple had not met the requirements, the union was to be deemed illegal cohabitation. However, the Procedures, like the Marriage Law, did not directly address the issue of the validity of or legal protection to be afforded to early and de facto marriages after the fact. These aspects of the law remained vague until 1994, when new Marriage Registration Control Regulations were enacted. The new regulations explicitly state that the marriage relationship of underage citizens who cohabit as husband and wife or of parties who meet all the legal requirements of marriage except for registration is invalid and not protected by law, and that applications for divorce from those who have not registered their marriage will not be accepted. Although no punishments for failure to register are provided, the regulations clearly represent a tightening of previous legislation.

### Introduction

The 1987 Chinese text *Teaching Materials on the Marriage Law*<sup>1</sup> distinguishes two major categories of invalid marriages (*wuxiao hunyin*): those that violate legal provisions and those that violate legal procedures. Marriage before reaching the legal age belongs to the former category, marriage without going through marriage registration belongs to the latter. Early marriage is prohibited in China under article 5 of the Marriage Law: "No marriage may be contracted before the man has reached 22 years of age and the woman 20 years of age," and late marriage is encouraged.<sup>2</sup> While the Law stipulates that marriages are to be registered in person by both parties at the marriage registration office (art. 7), it does not expressly forbid de facto marriage (*shishi hunyin*, where a man and woman, neither of whom has a spouse, live together as man and wife without having gone through marriage registration). In considering additional elements of the legal framework with regard to early marriages and de facto marriages, it is useful to look at pre-1994 documents and explicatory materials and 1994 documents.

### Pre-1994 Aspects of Early Marriage and De Facto Marriage

In accord with the Marriage Law, the 1986 Marriage Registration Procedures (hereinafter Procedures),<sup>3</sup> which are no longer in effect, similarly provided that marriage is prohibited and

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<sup>1</sup> HUNYIN FA JIAOCHENG 90 (Beijing, Law Publishing House, 1987).

<sup>2</sup> The Marriage Law was adopted on Sept. 10, 1980, and effective as of January 1, 1981. It remains in effect even though discussions are underway for its amendment. For the text in Chinese, see for example 2 ZHONGHUA RENMIN GONGHEGUO FALÜ FAGUI QUAN SHU (Compendium of Laws and Regulations of the People's Republic of China) 30-32 (Beijing, China Democratic Legal System Press, 1994); for an English translation, see Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *comp.*, 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 184-189 (Beijing, Foreign Languages Press, 1987).

<sup>3</sup> Approved by the State Council on Dec. 31, 1985, and promulgated by the Ministry of Civil Affairs on Mar. 15, 1986. For the Chinese text, see 7 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (Gazette of the State Council of the People's Republic of China) 183-185 (Mar. 31, 1986). For an English translation, see STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 860315.1 (Hong Kong, UEA Press, 1987-. looseleaf).

registration is not to proceed if one or both applicants has not reached the statutory age for marriage (art. 6) and that those who wish to marry must apply for marriage registration in the area where either party resides, equipped with the requisite documents such as resident identity cards and birth and marital status certificates (issued by the work unit or resident committee) (art. 4). Persons not qualified under the Law and the Procedures are not to be permitted to register; however, if the applicants are barred from obtaining the necessary supporting documents due to interference from a unit or individual, they may register provided they are deemed by the registry to have observed the provisions of the Law and the Procedures (art. 5).

### *Early Marriage*

With regard to the handling of cases of early marriage before 1994, it has been observed that marriage before one or both parties has reached the lawful age is an illegal act and in principle the marriage should be deemed invalid or be annulled.<sup>4</sup> In accordance with the spirit of the Procedures, with regard to those who at the time of marriage had not reached the lawful age but who had already reached the lawful age by the time that the Procedures were issued, after being given criticism and education, they are permitted to go through marriage registration; with regard to those who had not reached the lawful marriage age when the Procedures were issued, they should be instructed by the work unit or grass-roots organ to temporarily live apart, and wait until both have reached the legal age before going through marriage registration procedures. The starting point should be protection of the rights of the mother and child in the case of those who have not reached the legal marriage age but already have children or where the female is pregnant; the legal validity of their marriage should not simply be denied.<sup>5</sup>

It may also be noted that in 1992, a circular on "Tightening Up Marriage-Related Work and Preventing Early Marriage and Early Child Birth" was issued.<sup>6</sup> It points out that since the 1980s, the phenomenon of early marriage and early childbirth in the countryside has gradually become serious, adding to the number of births and intensifying the many contradictions of a peak period of births in the population, as well as exerting a detrimental effect on population control in the next century. After enumerating the weaknesses in marriage administration work (e.g., the lack of concrete legal provisions and the absence in the Marriage Law and the Marriage Registration Procedures of concrete measures for handling the illegal act of early marriage), the circular sets forth five suggestions for controlling early marriage and early birth. It recommends that every level of government must heighten understanding and strengthen leadership over marriage administration work; that propaganda and education on the marriage law and on prohibiting early marriage and early childbirth and promoting late marriage and late childbirth should be launched; that marriage registration be strictly administered according to law; that overall governance of early marriage and early birth be improved; and that the establishment of a marriage administration personnel contingent be strengthened.

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<sup>4</sup> *Supra* note 1, at 91.

<sup>5</sup> *Id.* at 91-92.

<sup>6</sup> This Ministry of Civil Affairs Circular was issued by the General Office of the State Council on Sept. 12, 1992. 25 STATE COUNCIL GAZETTE 1008-1011 (Nov. 24, 1992).

*De Facto Marriage*

De facto marriage is spoken of in relation to legal marriage, and refers to a man and a woman who fulfill the substantive requirements of marriage but who have not carried out marriage registration, who live together as husband and wife and whom the community also recognizes as husband and wife, and whom the law recognizes retroactively as being in a union between the sexes that has the validity of marriage.<sup>7</sup> Not all unions where a man and woman have not gone through the lawful procedures can be regarded as de facto marriages; the latter have been characterized as possessing four characteristics. These include: 1) a man and woman in a de facto marriage must both meet the legal requirements of marriage. That is, both parties cohabit completely voluntarily, both have already reached the legal age of marriage, neither has a spouse, they do not belong to categories of relatives prohibited from marrying, nor are they infected with a disease that makes marriage proscribed. 2) Both parties must have the intention of living together for their whole lives. 3) Both parties must live openly as husband and wife; that is, not only at home should they live as a couple, but also abroad they should be recognized as having the status of husband and wife. 4) Marriage registration procedures necessarily have not been fulfilled in a de facto marriage; this is where it differs from a legal marriage.<sup>8</sup>

According to a 1989 Supreme People's Court interpretation,<sup>9</sup> if a man and a woman were living together before the implementation of the March 15, 1986, "Marriage Registration Procedures" and one party files for divorce before a people's court, if when the suit is brought both parties meet all the legal requirements of marriage, they may be viewed as having a de facto marriage relationship; if they do not meet the requirements at the time of the suit, it will be considered illegal cohabitation. If after the implementation of the Procedures a man and woman live together as man and wife without having gone through marriage registration procedures but considered by the community to be husband and wife, and one party files for divorce, if while they were living together both parties met all the legal requirements of marriage, they may be viewed as having a de facto marriage relationship; if while they were living together one or both parties did not meet the legal requirements of marriage, it should be viewed as illegal cohabitation. Looking ahead (*see below*, re 1994 Regulations), the Supreme People's Court interpretation held that after new marriage registration regulations were implemented, a man and woman without spouses who lived together as man and wife without going through marriage registration would be treated as having an illegal cohabitation relationship.

Thus, March 15, 1986, is a watershed in the recognition to be accorded de facto marriages. Before that date, if a couple lived together, whether underage or otherwise legally unqualified, as long as they met all the requirements of marriage by the time they filed for divorce, their relationship would be considered a de facto marriage; after that date, if at any time during the cohabitation one or both had

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<sup>7</sup> ZHONGGUO HUNYIN FA JIAOCHENG (Teaching Materials on China's Marriage Law) 80 (Beijing, People's Court Press, 1992. rev. ed.)

<sup>8</sup> *Id.*

<sup>9</sup> *Several Opinions on the People's Courts Trying Cases Involving Those Who Live Together in the Name of Husband and Wife Without Having Registered the Marriage* (Nov. 21, 1989), in 1 ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO (Gazette of the Supreme People's Court of the People's Republic of China) 21, 22-23 (Mar. 20, 1990). The circular (Supreme People's Court, Civil Division, No. 38 of 1989) on the issuance of this document and of another on divorce cases is dated Dec. 13, 1989.

not reached the legal age or met the other legal requirements, then when they divorced their relationship could not be deemed a de facto marriage.

With regard to the handling of de facto marriages, when a dispute arises, the parties are first to be given strict criticism and education.<sup>10</sup> The illegality of the couple's conduct must be pointed out, the reasons why the law does not give them protection explained, and they must be urged to enhance their concept of the legal system; then the case should be adroitly handled according to the separate concrete circumstances. Such circumstances, include, among others, some of the following. In cases of cohabitation without registering the marriage or without making up (*buban*) marriage registration procedures subsequent to the implementation of the Marriage Law on January 1, 1981, if one or both parties proposes termination of the cohabitation relationship, in general the termination should be allowed. Where both the man and the woman meet the marriage requirements and only failed to go through the marriage registration procedures, they should be criticized and educated, the illegality of their marriage should be pointed out, and in mediating a reconciliation they should be instructed to make up the marriage registration procedures. Where both parties or one party does not meet the marriage requirements and where they have not gone through marriage registration procedures, the marriage should be declared invalid, and their illegal marriage relationship should be terminated.<sup>11</sup>

The validity of de facto marriage has long been a matter for debate in Chinese legal circles, with some advocating that it be recognized, others advocating that it not be recognized, and still others advocating conditional recognition.<sup>12</sup> According to the 1992 work *Teaching Materials on China's Marriage Law*, on the basis of the 1989 Supreme People's Court interpretation, there should be conditional recognition of the validity of the action of engaging in a union between the sexes sans marriage registration; that is, once this union between the sexes has been determined to be a de facto marriage, it is considered to have the validity of marriage.

In practice, the question of whether or not a marriage is valid and whether a relationship is recognized as a de facto marriage is often only raised when there is a marital dispute, typically in the case of divorce.<sup>13</sup> In most circumstances, despite social controls and social pressure to eliminate de facto marriage, it may be difficult to determine and to regulate such relationships. The 1989 Supreme People's Court interpretation does not address the question of whether, if there is no divorce, these relationships are deemed de facto marriages or not, and so if the parties had not filed for divorce, their status would seem to have been unclear (at least if the union were formed before February 1994--see below).

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<sup>10</sup> *Supra* note 1, at 92.

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 7, 81-82.

<sup>13</sup> *Id.*

### The 1994 Marriage Registration Regulations

The Marriage Registration Procedures were repealed under the 1994 Marriage Registration Control Regulations (art. 34), which mark another watershed in the treatment of de facto marriage.<sup>14</sup> The Regulations require in-person marriage registration with a local marriage registration office and the presentation of residency papers, resident identity cards, and marriage status certificates issued by the work unit or village/neighborhood committee. Some localities require pre-marriage physical checkups as well, and presentation of the relevant papers to the marriage registration office (art. 9). The application for marriage registration may be rejected if one or both parties have not reached the legal marriage age (art. 12, item 1). As was stipulated under the Procedures, if the parties are unable to obtain the necessary documents because of interference, the registration office will accept the registration upon establishing that the parties meet the requirements for marriage (art. 13).

The most notable feature of the 1994 Regulations is that, unlike the earlier provisions, they explicitly state that early marriage and de facto marriage are invalid and lack legal protection (art. 24):

Where citizens who have not reached the legal marriage age but live together as husband and wife or parties who meet the requirements for marriage and live as husband and wife but have not applied for marriage registration, their marriage relations are invalid and not protected by law.<sup>15</sup>

Moreover, the Regulations provide that an application for divorce will not be accepted from parties who did not register their marriage (art. 18, item 4). Although the registration office personnel in charge may be punished for granting registration in violation of the provisions of articles 12 and 18, and the marriage registration cancelled (art. 28), no punishments for failing to register a marriage are set forth. Still, the 1994 Regulations provide a much clearer statement on the legal status of underage and de facto marriages than did the Procedures. It may also be noted that a 1994 Supreme People's Court interpretation of the 1994 Marriage Registration Control Regulations states that as of February 1, 1994, the marriage relationship of men and women without spouses who live together as husband and wife without having gone through marriage registration procedures will become void and will not be protected by law.<sup>16</sup>

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Law Library of Congress  
March 1998

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<sup>14</sup> Approved on Jan. 12, 1994, and promulgated and effective from Feb. 1, 1994. For the text in Chinese, see 3 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (Gazette of the State Council of the People's Republic of China) 91-96 (Mar. 17, 1994); for an English translation, see Foreign Broadcast Information Service, *Daily Report: China*, Mar. 9, 1994, at 38-41.

<sup>15</sup> *Id.* at 40.

<sup>16</sup> Notification of the Supreme People's Court on the Application of the New Marriage Registration Control Regulations of Apr. 4, 1994. Liang Guoqing, ed., XIN ZHONGGUO SIFA JIESHI DAQUAN 1992-1994 (Compendium of Judicial Interpretations of New China 1992-1994) 382 (Beijing, China Procuratorial Press, 1995).



## DE FACTO MARRIAGE IN THE PEOPLE'S REPUBLIC OF CHINA

Both the Marriage Law of 1950 and the new Marriage Law enacted in September 1980 are silent on the question of de facto marriage. There is thus no official definition of what constitutes de facto marriage or of the legal status of such relationships. It is the practice of the People's Republic of China, however, that government policy prevails in the absence of law. Articles in law journals and legal newspapers and a statement on the subject issued by the Supreme People's Court make it clear that China does extend some form of recognition to de facto marriages, though policy is not unambiguous.

De facto marriage has been defined by the Supreme People's Court as open cohabitation between two unmarried people, who are recognized by the community as having a husband and wife relationship, but who have not formally registered their marriage.<sup>1/</sup> Other sources also explicitly state that the families of both partners must recognize them as a married couple.<sup>2/</sup> Such actions as holding a wedding party, addressing each other in public as husband and wife, and clearly planning a life together, help to confirm a relationship as a de facto marriage and to distinguish it from a casual affair. The Chinese categorize liaisons between people who do not intend to live as if married and/or relationships in which one partner is already married to a third person as

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<sup>1/</sup> Sifa zhuliyuan gungzuo shouce [Work Handbook for Judicial Assistants], 13, (Beijing: Legal Press, 1981).

<sup>2/</sup> Zhongguo fazhi bao [China Legal News], (Beijing), August 20, 1982, p. 3.

"living together illicitly" (pingzhu). Those cases are not considered to be instances of de facto marriage and are not accorded the same legal protection.<sup>3/</sup>

The responses of legal specialists to questions in an advice column in the journal Democracy and Law seem to differentiate between couples who intermittently share quarters and those who have a common household, in determining whether the relationship deserves legal protection. For example, a woman who had celebrated a wedding feast with a man and lived with him for several months, but who had never registered the relationship as a marriage, was counseled to carry out divorce proceedings before marrying another man. Her de facto marriage had been accepted as valid and was accorded legal protection.<sup>4/</sup> In another case, a young man who had had a more casual relationship and apparently never established a common household was told by the advisor that he would not be considered as having had a de facto marriage.<sup>5/</sup>

Since it is China's policy to encourage compliance with the Marriage Law, the authorities generally pressure couples who meet the specified requirements to register. The Law of 1980 states that men must be at least 22 years of age and women at least 20 in order to marry. In cases where at least one partner is underage, they are urged to abandon the relationship until the time when it can be legally registered. If

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<sup>3/</sup> Minzhu yu fazhi [Democracy and Law], No. 6, 1980, p. 38.

<sup>4/</sup> Id., No. 1, 1980, p. 43.

<sup>5/</sup> Id., No. 5, 1980, p. 38.

children have been born however, the provisions of the marriage law that require that the rights of women and children be protected supersedes.<sup>6/</sup> In remote areas in which the presumption might be made that the couple did not know of the provisions of the marriage law, they would be educated as to the correct procedure and encouraged to register.<sup>7/</sup>

Chinese couples enter into de facto marriages for a variety of reasons. Some may not meet the age requirements for legal marriage. Others may have difficulty obtaining official permission despite meeting the stated conditions. This is one area in which government policy takes on particular significance. Controlling the growth of population has great priority; therefore late marriages are encouraged. Since the procedure for obtaining marriage certificate involves bringing a copy of one's household registration and a document from one's work unit to the proper office, there are several stages at which couples old enough to legally qualify for marriage but younger than is politically fashionable could be pressured into delaying registration. Yet the writings of the legal specialists make clear that universal registration of marriage is the goal. De facto marriages thus are seen as legally incomplete.

Prepared by Tao-tai Hsia, Chief,  
and Constance A. Johnson, Editor,  
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Law Library, Library of Congress  
Washington, D.C. 20540  
January 1983

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<sup>6/</sup> Supra note 1, p. 14.

<sup>7/</sup> Supra note 2, No. 4, 1982, p. 44.

3/11/82

Dear Mr. Long:

Thank you for your letter of January 13, 1982, and for your kind comments about the report on de facto marriage which I prepared for the U.S. Immigration and Naturalization Service in Hong Kong. I am happy to see that we are in agreement that it is a most thorny question, and I find your summary of the major point of my report to be accurate.

If you can obtain a statement, official or not, from the Ministry of Civil Affairs in Beijing about de facto marriage, I would be grateful if you would share it with me. I think it would be especially helpful if you could obtain an official clarification of what constitutes cohabitation ( "tongzhu")--for the purpose of deciding that a de facto marriage has been established--and also what constitutes a husband and wife relationship for the same purpose. Specifically, I am wondering whether cohabitation necessarily involves sharing a common residence and, if so, what length of common residence is involved. I am also wondering whether a husband and wife relationship involves evidence of a commitment to permanently sharing a life in common.

Thank you for sharing with me Mr. Xue Bao Hua's letter on de facto marriage. I do not believe, however, that he sheds much light on the difficult questions concerning de facto marriage. In fact he appears to have reiterated some of the contradictory and confusing statements found elsewhere. Nevertheless his statement that children born out of de facto marriages are called illegitimate seems noteworthy. He also indicates that statements about the fact of cohabitation in notarial certificates cannot be taken as proof of the existence of a de facto marriage.

I am enclosing a translation, which I have recently prepared, of a statement on de facto marriage made in a Beijing publication issued in December of 1981. I would call your attention to the fact that the authors appear to use the term "pingzhu" ( ) quite broadly to refer to a relationship in which the people are living together "without good motives." The authors, however, appear not to be restricting "pingzhu" to situations in which one party already has a spouse. As you will recall, an earlier translation of a letter from 6 Minzhu yu fazhi 38 [Democracy and Law] (1980), contained a reference to "pingzhu," which I had translated as "living together illicitly." And in this letter "pingzhu" was defined as referring to "a man and a woman, one or both of whom already has a spouse, who live together or with a third party." Furthermore, the article indicated that "living together illicitly" ("pingzhu") refers to those who are not recognized by the masses around them as having

a husband/wife relationship, but whose relationship of illegally living together the masses instead regard as improper." I am enclosing a copy of my translation of this letter for your reference.

It should be kept clearly in mind that the 1981 publication from which I have prepared the enclosed translation is unofficial and thus lacks the force of law. However, if in fact Beijing should regard "pingzhu" as referring to any couple who are living together "without good motives," regardless of whether one or both already has a spouse, it would appear that a couple's options would be limited. If they were living together "with good motives," they could very easily be termed partners in a de facto marriage and required to register. In saying this, I am assuming that "good motives" may refer to their being regarded as having the objectives of sharing a life in common and treating each other as man and wife. On the other hand, if the couple are living together, but are not regarded as having such "good motive," their situation could be regarded as "pingzhu," and they could be required to terminate their living together. In both of these cases the definition of "living together" would also be important.

Judging from Mr. Xue's response and from other sources, I suspect that any clarification you may receive from the Ministry of Civil Affairs will not satisfy your need for specific information. I still believe that at some point it will be necessary, if it is at all possible, for the U.S. Consulate General and the U.S. Immigration and Naturalization Service to lay down some guidelines defining what constitutes de facto marriage from their perspective and to clearly establish a policy of admitting only those Chinese who cannot be regarded as having de facto marriages under those guidelines.

I look forward to your reply and I appreciate your sharing the various communications with me.

Sincerely,

Tao-tai Hsia, Chief  
Far Eastern Law Division

Enclosures

Mr. John D. Long  
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Jin Mosheng, Liu Qishan et al. Falu changshi shouci [Handbook of legal knowledge]. v. 2. Beijing, Zhongguo qingnian chubanshe. Dec. 1981. p. 19-20.

Shishi hunyin ( de facto marriage). Refers to a man and a woman who in fact have already formed the marriage relationship: (1) neither the man or woman has a spouse, (2) both parties have the motive of sharing a life in common and treat each other as man and wife, (3) the relationship has already been recognized by the families of both parties and the surrounding masses. It differs from the marriage relationship in general in that marriage registration has not been carried out.

Because the man and woman have not carried out the marriage registration prescribed by law, de facto marriage is a type of marriage that violates the law. If the man and woman both meet the conditions for marriage set forth in the Marriage Law, after they have been given criticism and education, they should be ordered to carry out the registration procedures belatedly and become lawfully married. If certain de facto marriages came into being because of early marriage and one or both parties are under the marriageable age prescribed by law, yet they share a life in common in order to avoid marriage registration, the strictness and seriousness of the law should be upheld. It should be clearly explained that marriage should be carried out according to law; that is, it is necessary to fulfill the requirements for marriage and it is necessary to carry out marriage registration. In the case of those who cohabit ( "tongzhu") without having reached the marriageable age and have not had a child, on the basis of doing work well, the marriage should be declared void. As to situations in which people are living together illicitly ( "pingzhu") without good motives, these relationships basically are not the marriage relationship and have basic differences from de facto marriage as described

above. As to this type of violators of the law, their living together should be terminated.

Translated by Tao-tai Hsia, Chief  
and Kathryn A. Haun,  
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March 1982

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Dear Mr. Davis:

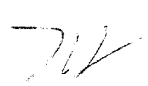
In response to your request of September 17, 1981, I am enclosing a report on "'Marriage as a Matter of Fact' in the People's Republic of China," along with several translations of pertinent materials.

The direct question raised in your letter was whether "customary relationships" in China are considered to be legal marriages. If one defines a "legal marriage" as one that conforms to the statutory requirements for marriage, then one must conclude that a "customary relationship" is not a legal marriage since compliance with the requirement of registration is absent in such marriages. The enclosed report attempts to address the question of whether such a "customary relationship," understood to be a marriage relationship that has not been registered, still may be a valid marriage.

As we were informed on November 7 that your office had just learned that receipt of this information in Guangzhou is a matter of great urgency, I am forwarding a "quick and dirty" copy so that you will have these materials as soon as possible. I hope that this type of copy does not inconvenience you.

I hope that you will find this information useful.

Sincerely,

  
Tao-tai Hsia, Chief  
Far Eastern Law Division

Enclosures

Mr. S. E. Davis  
Acting Assistant Commissioner, Adjudications  
U.S. Department of Justice  
Immigration and Naturalization Service  
Washington, D.C. 20536

TTH:KAR  
11/10/81

CK



"MARRIAGE AS A MATTER OF FACT" IN THE PEOPLE'S REPUBLIC OF CHINA

An advisory opinion has been requested regarding the question of whether "customary relationships" in the People's Republic of China (PRC) are considered to be legal marriages.

In responding to this question, we are assuming that by "customary relationships" the inquirer is referring to what the Communist Chinese themselves call "shishi hunyin" [事实婚姻], a term which one may translate as "marriage as a matter of fact" or "de facto marriage." Because some of the characteristics of shishi hunyin are different from those of what is known in the U.S. as "common law marriage" or "de facto marriage," we prefer to use herein either the Chinese term "shishi hunyin" or the English translation "marriage as a matter of fact." Shishi hunyin is understood to be a marriage distinguished by the fact that it has not been registered with the appropriate authorities in accordance with the PRC's Marriage Law.

The situation in the PRC with respect to "marriage as a matter of fact" up to 1971 has been well covered in M. J. Meijer's Marriage Law and Policy in the Chinese People's Republic (Hong Kong, Hong Kong University Press, 1971), p. 177-194, a xerox copy of which is attached.

Here we will update Meijer's discussion mainly by referring to materials promulgated or published in the last two or three years. Translations of these materials are attached for your reference.

First, it is to be noted that the Marriage Law of the People's Republic of China adopted September 10, 1980, and put into effect January 1, 1981, resolves some of the questions that had arisen regarding the role of registration in

establishing a valid marriage. Article 7 of the 1980 law provides as follows:

Both the man and woman who are applying for marriage shall register in person with the marriage registration office. Those who are applying for marriage in accordance with this law shall be allowed to register and shall be issued marriage certificates. After obtaining the marriage certificate, the man and woman are regarded as having established relations as husband and wife. 1/

The implication of this statement would seem to be that prior to obtaining the certificate, the man and woman would not be regarded as having established relations as husband and wife, and we have no doubt that this is the policy ideal that Beijing is attempting to enforce more vigorously than ever before. We think this is Beijing's ideal first because control of the establishment of marriage is a powerful means of overall control of PRC society and second because control of the establishment of marriage plays a critical role in the implementation of the PRC's policy of attempting to limit each family to one child. Gaining greater control over the establishment of marriage also is a part of Beijing's general policy of strengthening the legal system and bringing about greater compliance in the localities with laws, policies, and orders issuing from Beijing.

It will be noted that the 1980 Marriage Law has no provision on "marriage as a matter of fact" or any other form of unregistered marriage. The Marriage Law itself does not give one a sound basis for concluding either that shishi hunyin is recognized or that it is not recognized. For statements regarding shishi hunyin, one must look to sources other than a statute. To the best of our knowledge, no Communist Chinese statute has dealt with the subject of "marriage as a matter of fact" since the PRC was established on October 1, 1949.

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1/  
The English translation of Article 7 quoted here is taken from Foreign Broadcast Information Service, Daily Report, China, September 19, 1980, p. L22.

The sources discussed in what follows are non-statutory, and all were published before the 1980 Marriage Law was put into force. The authority that these sources carry is difficult to determine. In general, one may regard them as statements by Chinese jurists of their understanding of current policy. The publication of these statements is an indication of their having been given the imprimatur in some form, direct or indirect, by relatively high level officials. None of the sources is a truly official one, but it must be kept in mind that the distinction between "official" and "unofficial" in an authoritarian state such as China is blurred. It further must be emphasized that in the PRC the distinction between law and policy also is blurred, policy sometimes having as much authority as statutory law, and statutory law sometimes carrying much less authority than it does in the United States.

A close reading of the pages from Meijer's work mentioned above reveals that at the time he was writing no clearcut, authoritative guidelines had been developed presenting the conditions that constituted shishi hunyin. The sources that he includes in his work present somewhat differing statements about what constitutes a de facto marriage. (Meijer opted for the use of the term "de facto marriage" as the proper English translation of what I have translated as "marriage as a matter of fact.") One also finds somewhat differing statements in the sources that we have translated from recent years.

The pertinent statements that one finds in these recent sources are the following:

1. Minzhu yu fazhi [Democracy and Law], No. 6, 1980, p. 38. Marriage as a matter of fact involves a man and a woman, neither one of whom has a spouse.... Marriage as a matter of fact refers to a man and woman who both have the motive of sharing a life in common, and they treat each other as man and wife.... Marriage as a matter of fact refers to those who are openly recognized by the masses around them as having a husband/wife relationship.... As to marriage as a matter of fact, if it fulfills the conditions for marriage

after those involved have been given education, the lawfulness of their marriage can be recognized retroactively and moreover they may carry out remedial marriage registration....Although marriage as a matter of fact in reality already constitutes marriage, it is not the same as the marriage relationship in general in that marriage registration has not been carried out. Because the procedures for marriage provided for in the law have not been carried out, it is a type of marriage that violates the law. But if the two parties do not fail to meet the other requirements of the Marriage Law, after they have been given criticism and education, they should be ordered to carry out remedial registration.

2. Faxue cidian [Legal Dictionary], Shanghai, Shanghai Cishu Chubanshe, 1980, p. 384. This source defines "shishi hunyin" as follows:

Marriage as a matter of fact refers to a marriage that is constituted between a man and a woman who do not have a spouse and who have not carried out marriage registration but who have lived together in a husband/wife relationship. In ascertaining the legal validity of this type of marriage, one should, on the basis of the relevant provisions of the Marriage Law, proceed from the actual conditions and resolve the matter by seeking truth from facts. If the man and woman fulfill the statutory conditions, after carrying out criticism and education of the parties involved, the lawfulness of their marriage may be retroactively recognized and remedial marriage registration may be ordered. If they do not fulfill the statutory requirements for marriage, their marriage should be declared void.

3. Minzhu yu fazhi [Democracy and Law], No. 1, 1980, p. 43. Since you and Mr. Ding did not register, the marriage was not lawful. But in the final analysis you and Mr. Ding were already married. This is so because, first, you and Mr. Ding had already voluntarily lived together; second, you and he were already recognized among the masses as having a husband/wife relationship (which is reflected by the fact that you had a wedding feast and distributed the wedding candies); third, the masses already recognized you as husband and wife (as reflected by the fact that they attended your wedding feast and ate the wedding candies). As to the fact that you lived separately after less than a year of marriage, it was because you lacked the foundation you should have had before marriage, and because the feeling you had for each other broke up after marriage. Therefore, it cannot be denied that a marriage relationship as a matter of fact existed because you already had married....We think that when a man and woman, neither one of whom has a spouse, live together in a husband/wife relationship although they have not carried out marriage registration, and they are recognized by the masses as having a husband/wife relationship, their relationship is "marriage as a matter of fact."

4. Minzhu yu fazhi [Democracy and Law], No. 5, 1980, p. 38. "Marriage as a matter of fact" generally refers to certain unmarried men and women who because of special circumstances have not gone to the people's government to register their marriage, even though their marriage relationship is an accomplished fact that everyone generally acknowledges. For example, they openly live together, their parents, relatives, friends, leaders, and neighbors all know that they do, and they address each other as husband and wife in front of outsiders. Although it [this relationship] objectively also receives legal protection, it still must be pointed out to both the man and the woman that their doing things this way is not in accordance with the provisions of the Marriage Law and they must be given education and assistance. They should carry out remedial registration procedures to make things right....One cannot say that as soon as a man and woman develop a [sexual] relationship that it is the marriage relationship.

Several problems arise in attempting to apply these statements about shishi hunyin to concrete cases of relationships that may constitute marriages as a matter of fact. First, none of the key terms used in these sources is defined in the precise way that would make it possible for an outsider to determine readily whether a relationship in question was a marriage as a matter of fact. For example, living together in a husband/wife relationship seems to be an important element of shishi hunyin, but one cannot find any precise definition of this term. One wonders if the couple must live under the same roof, for what period of time they must have lived under the same roof before shishi hunyin is established, whether sporadic "living together" is sufficient to establish a marriage as a matter of fact, etc. One can raise similar questions about the form that recognition by the masses as husband and wife must take in order to be a decisive element in the establishment of a marriage as a matter of fact. If the masses were aware that a couple were living together but did not regard them as being husband and wife, would the couple still be considered to be married as a matter of fact? Is the masses' attendance at a wedding feast an essential part of community recognition and acceptance of a couple's marriage as a matter of fact? What would constitute

the "special circumstances" that could keep a couple from registering their marriage? Must there be "special circumstances" in all cases in which a couple has not registered? What if there were no special circumstances? What precisely is a husband/wife relationship?

A second problem that arises is attempting to determine whether marriage as a matter of fact fully constitutes marriage prior to registration of the marriage. The first source quoted above states that "although marriage as a matter of fact in reality already constitutes marriage, it is not the same as the marriage relationship in general in that marriage registration has not been carried out. Because the procedures for marriage provided for in the law have not been carried out, it is a type of marriage that violates the law." [Emphasis added.] Apparently, there is no sanction attached to this violation. It may be somewhat difficult for one trained in American law to conceptualize the nature of "a marriage that violates the law."

In all instances, the sources from recent years and those in Meijer's book seem to agree that remedial registration is to be carried out in cases of shishi hunyin when they come to the attention of officials. One then wonders if marriage as a matter of fact actually is a fully valid marriage only after it has been registered. One also wonders about the validity of a marriage as a matter of fact in which the couple involved have never been ordered or persuaded by the authorities to carry out marriage registration. One further wonders in general about the validity of a marriage as a matter of fact prior to examination by the registering officials since, theoretically, there is always the possibility that an instance of shishi hunyin will be refused registration because the couple somehow do not meet the conditions of the Marriage Law. All the sources that we have presented here fail to raise such questions and hence leave the status of a marriage as a matter of fact rather vague and uncertain. Apparently, shishi hunyin does

differ from a common law marriage in the U. S. in that it does not stand on its own merit, but must be completed by registration. Because shishi hunyin seems to necessitate remedial registration, we have preferred not to use the terms de facto marriage or common law marriage since we understand such marriages not to require compliance with certain procedural formalities in order to be fully valid.

Another problem that arises is how an outsider may determine whether the couple lived together in a husband and wife relationship and were recognized by the community as husband and wife. While both parties to a shishi hunyin dating from the early 1950s or even earlier might be identified in the household register as husband and wife sharing a common residence, it is less likely that parties to such a marriage established in the 1960s and 1970s would be so treated in the household register. When one asks local officials, either urban or rural, to provide a statement about a couple's relationship, one encounters other problems.

It is unlikely that local officials, particularly in the rural areas, would be well-trained in the law, and one must recognize that these officials also most probably would face the same problems as an outsider in attempting to decide whether shishi hunyin had been established because the officials themselves also may lack adequate guidelines. It may be the case that some local officials are making what they regard as the proper decisions without necessarily attempting to square these decisions with the limited guidelines that do exist. The Communist Chinese have never taken a legalistic approach to personal status questions whereby a relationship is evaluated in terms of whether it strictly conforms to existing legal or quasi-legal criteria. A comment that John D. Long, Vice-Consul in Guangzhou, made in an October 9, 1981, letter to the Far Eastern Law Division regarding the relevance of scholarly materials regarding adoption to the actual adoption process in China may also to some extent describe the situation with respect to shishi hunyin. Mr. Long

wrote:

...I still feel that in light of the circumstances surrounding most all of the adoption cases we have witnessed here, many of the points which the legal scholars raised in their articles were expressions of an ideal to which they hoped China would move. On the basis of our experience it seems most of the fine procedural and theoretical arguments they offered failed to penetrate to the adoption process as it was actually effected throughout this province.

Similarly, it may be the case that some local officials do not show much concern with whether a relationship meets a specified set of conditions before they decide whether it constitutes a marriage as a matter of fact. This, of course, makes it most unlikely that all such relationships would be consistently evaluated throughout China. One would expect that some local officials would be quick to call a relationship a marriage as a matter of fact, while other local officials would be reluctant to do so. Further, one would expect also that there would not be consistency in approving or requiring marriage registration.

In this connection, it is essential to examine two other aspects of marriage in China. First, it must be taken into account that approval of registration may not follow automatically if a couple meets the conditions of the Marriage Law. On page 191 of Meijer's work, he states that subsequent to the June 1, 1955 issuance of the ordinance on marriage registration that was ancillary to the 1950 Marriage Law, the Ministry of Interior indicated in People's Daily that parties applying for registration should, in Meijer's words, "bring documents from the unit with which they work, or their army unit, in evidence of name, age, marital status, occupation, and nationality." While the 1955 ordinance itself did not contain provisions about such documents, item (1) of the 1980 Measures on Marriage Registration, an English translation of which is attached, explicitly provides that "the man and woman who are applying for marriage must hold a certificate of their own household registration and a certificate issued by their production



brigade or work unit concerning their month and year of birth, nationality, and marital status." It is apparent that at some point the issuance or non-issuance of such documents by the work unit became a means of delaying or denying permission to marry even before the couple reached the point of applying for registration with the officials in charge of registration. In support of this statement, please see the attached translation of a letter and the editor's reply from Minzhu yu fazhi, no. 12, 1980, p. 40.

Officials at the level of the work unit or the organ that actually carries out registration are known to consider such factors as the couple's attitudes toward work and/or politics, their economic situation, employment opportunities, the availability of housing, family background and family attitudes, the actual and desirable birth rate for the area, etc. in deciding whether to issue the necessary documents or to permit registration.

Especially in recent years, there has been growing pressure on local officials to promote marriage at as late an age as possible as one means of limiting the number of births. Since the PRC has adopted the rule of "one child per family" as its goal in efforts to control the population, it doubtless has been made more difficult for a couple to obtain the documents from the work unit or to register marriage. Registration of marriage having become a rather difficult matter, it may be the case that some local officials, parents, and the community are looking sympathetically upon unregistered relationships involving sex between young men and women who do not qualify for registering marriage due to reasons other than their not meeting the conditions of the Marriage Law. For example, while they may be old enough to satisfy the letter of the Marriage Law, they still may be denied permission to register because they are too young to be considered as satisfying the policy requirement of encouraging late marriage.

It also is most likely the case that many young people married in haste when serving in the countryside at the order of the state. When in the villages, many urban youths doubtless felt lonely and isolated and entered into ill-considered relationships that they wished to terminate when policy became more liberal and they were allowed to return to the city.

Because Beijing attempts to enforce a strict morality as well as to delay marriage and limit births, the leadership most likely now finds itself in a situation in which it must insist upon registration as an essential procedure in the establishment of a valid marriage, but at the same time the number of existing shishi hunyin forces it to give some form of recognition to this irregularly constituted marriage relationship so as to prevent circumvention of both the letter and the spirit of the Marriage Law, the population policy, and morality.

Beijing probably did not include a provision on shishi hunyin in the 1980 Marriage Law nor provide much clarification of this relationship in the years between 1950 and 1980 because to have done so perhaps would have been to facilitate and encourage unregistered marriage relationships. In the last analysis, registration is an act whereby the state gives its sanction to a marriage. It is most unlikely that Beijing would relinquish this right if there were not a compelling reason to do so.

A draft of a civil code is currently circulating in the PRC. This draft is said to contain provisions on marriage. We think it unlikely that the civil code will contain provisions on shishi hunyin. We imagine that Beijing's ideal is that there eventually will be no cases of shishi hunyin, registration having become universal. We can make no predictions on when this ideal may be realized. For the time being, statements on shishi hunyin most likely are intended to be used established for guidance on how to handle relationships that were ~~handled~~ in the past that did not conform to the Marriage Law's requirement of registration. While universal

for many years with rejection of the unpopular policies regarding late marriage and one child per family by many Chinese people and some sympathetic local officials, particularly those in rural areas.

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